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Commonwealth Edison Co. v. State of Montana: Constitutional Limitations on State Energy Resource Taxation

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This note examines the case of Commonwealth Edison Co. v. State of Montana, *where the United States Supreme Court analyzed and defined the permissible limitations of state energy resource taxation. While the Court adhered to the test of constitutional taxation established in* Complete Auto Transit Inc. v. Brady, *which strongly upheld a state's sovereign right to tax a local incident of interstate commerce, the Court failed to realize the practical ramifications of its ruling in the context of the nation's energy problems.*

I. INTRODUCTION

Since 1921, Montana has levied a severance tax on the mining of coal within its borders.[1] There is nothing in itself unusual about severance taxes; many states exact them for the extraction of natural resources.[2] Seventeen states impose severance taxes on coal

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1. MONT. REV. CODES ANN. § 84-1314 (Supp. 1975).

2. "A severance tax may be defined broadly as a levy assessed at flat or graduated rates by a government on the privilege, process, or act of commercially severing . . . natural resources from the soil . . . and measured by the physical amount or gross of net value of the natural resources produced. . . ." Lochner, *The Economic Effect of the Severance Tax on the Decisions of the Mining Firm*, 4 NAT. RESOURCES J. 468, 469 (1965). Montana justified its severance tax on the following grounds:

> Severance taxes are levied upon a state's natural resources for several reasons. One, obviously, is the need for revenue. Another is that a state's resources, particularly its mineral resources, are nonrenewable. When the resources are mined, the state loses a valuable asset forever. The levying of a severance tax is one manner by which the state can share in the profit associated with the extraction of a mineral asset. A severance tax, moreover, can help discourage wastes; a basic assumption of severance taxation is that future generations will need mineral resources similar to those used today.

MONTANA LEGISLATIVE SUBCOMMITTEE ON FOSSIL FUEL TAXATION, INTERIM STUDY 3 (1974), cited in Note, *The Increasing Conflict Between State Coal Severance Taxation and Federal Energy Policy*, 57 TEX. L. REV. 675, 677 n.8 (1979) (hereinafter cited as *The Increasing Conflict*.) The most obvious correlation to severance taxation is the special cost incurred by the state as a result of the mining activity taking place, especially strip mining activity. Facilities are built for mining industries that do not serve the general public. Also, special costs are borne by the state as a result of the boom towns that spring up alongside the mines. "The impact on state treasuries is heightened by the fact that much of the energy development is occurring in sparsely settled, remote areas with minimal physical and service infra-mining.[3] However, what is highly questionable and extremely controversial,[4] in light of current energy problems,[5] is the unprecedented rate of severance taxation on coal mining in Montana, which stands at thirty percent of the contract price of mined coal as a result of a 1975 statute.[6]

Montana's tax has caused a furor among mining companies, utility companies, and consumers. In 1978, Commonwealth Edison Company and fourteen other plaintiffs brought suit against Montana, seeking both refunds of severance taxes paid under protest and declaratory relief,[7] contending that the tax was

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structure." Comment, *Constitutional Limitations on State Severance Taxation*, 20 NAT. RESOURCES J. 887, 903 (1980).

3. Alabama, Arizona, Arkansas, Colorado, Florida, Idaho, Kentucky, Louisiana, Montana, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, West Virginia, Wyoming. *Proposed Amendments to Powerplant and Industrial Fuel Use Act: Hearings on S.* 2695 *Before The Sen. Comm. on Energy and Natural Resources*, 96th Cong., 2d Sess. 73 (1980).

4. "Several Commentators have agreed that Montana and other similarly situated western states have pursued a policy of OPEC like revenue maximization, and that the Montana tax accordingly bears no real relationship to the services and protection afforded by the state." Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946, 2967 (1981), quoting R. NEHRING, B. ZYCHER & J. WHARTON, COAL DEVELOPMENT AND GOVERNMENTAL REGULATION IN THE NORTHERN GREAT PLAINS: A PRELIMINARY REPORT 148 (1976).

5. The availability of energy resources, and the price which they command, is one of the most divisive issues of our time. Armed with unfettered power and freed from constitutional restraint, the self-interests of energy rich states must come into conflict with those which lack such resources and with the national interest in energy issues . . . .

> Montana's tax is a prime example of the abuses which may flow from any rule which leaves the states with the unfettered power to tax.

Commonwealth Edison Co. v. State of Montana, 101 S. Ct. 2946 (1981).

"If unchecked by this Court, the exorbitant severance tax on essential energy resources may become the latest variant of the kind of divisive and recriminatory state action which made the Constitutional Convention essential." Brief Amici Curiae, 101 S. Ct. 2946, in support of appellants from the states of Connecticut, Iowa, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin.

6. MONT. REV. CODES ANN. § 15-35-103 (1979) Severance Tax Rates Imposed:

1). A severance tax is imposed on each ton of coal produced in the state in accordance with the following schedule:

HEATING QUALITY	SURFACE MINING	UNDERGROUND MINING
(btu/lb of coal)		
under 7,000	12 cents or 20% of value	5 cents or 3% of value
7,000 - 8,000	22 cents or 30% of value	8 cents or 4% of value
8,000 - 9,000	34 cents or 30% of value	10 cents or 4% of value
over 9,000	40 cents or 30% of value	12 cents or 4% of value

"value" means the contract sales price.

2). The formula which yields the greater amount of tax in a particular case shall be used at each point on this schedule.

3). A person is not liable for any severance tax upon the first 20,000 tons of coal he produces in a calendar year.

7. Commonwealth Edison Co. v. State of Montana, No. 42567 (Mont. 1st Judicial Dist., filed June 20, 1978). The plaintiffs were seeking a return of $5.4 million

invalid under the Commerce Clause[8] and the Supremacy Clause[9] of the United States Constitution. Without receiving any evidence, the trial court upheld the tax, and the Montana Supreme Court affirmed,[10] dismissing the claim for failure to state a cause of action upon which relief could be granted.[11] For reasons which will be examined herein, the United States Supreme Court affirmed the decisions of the lower courts and upheld the tax.[12]

II. COAL RESERVES IN MONTANA: FACTS OF THE CASE

The state of Montana occupies a unique geological position with regard to this nation's physical distribution of coal reserves, for located within its boundaries is approximately one-quarter of the United State's entire reserve of coal, and over one-half of its low sulphur coal.[13] Not only are the coal reserves in Montana enormous, but they are also among the cleanest in the nation, since very low sulphur coal (less than one percent sulphur) accounts for ninety-four percent of the coal mined in Montana.[14]

The positioning of these low sulphur reserves is indeed fortuitous for Montana,[15] since recent federal legislation has en-

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dollars of severance taxes paid under protest. The original plaintiffs were Commonwealth Edison Company, Central Illinois Light Company, Dairyland Power Cooperative, Interstate Power Company, Lake Superior District Power Company, Lower Colorado River Authority/City of Austin, Minnesota Power and Light Company, Northern States Power Company, Upper Peninsula Generating Company, Wisconsin Power and Light Company, Decker Coal Company, Peabody Coal Company, Westmoreland Resources Inc., and Western Energy Company. No. 42567 (Mont. 1st Judicial Dist., filed June 20, 1978).

8. "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." U.S. CONST. art. I, § 8, cl. 3.

9. The "Constitution, and the Laws of the United States . . . [s]hall be the Supreme Law of the Land. . . ." U.S. CONST. art. VI, cl. 2.

10. Commonwealth Edison Co. v. State of Montana, 615 P.2d 847 (Mont. 1980). (Justice Sheehy wrote the opinion in which Haswell, C.J., and Daly, Harrison, and Shea, J.J., concurred.)

11. In the author's opinion, the dismissal of the case without any factual scrutiny of the tax is the central issue, and is fully discussed in the analysis of Justice Blackmun's dissenting opinion and in the analysis section *infra*.

12. Commonwealth Edison Co. v. State of Montana, 101 S. Ct. 2946 (1981).

13. Energy Fact Book, DATA ON ENERGY RESOURCES, RESERVES, PRODUCTION, CONSUMPTION, PRICES, PROCESSING AND INDUSTRY STRUCTURE 582 (1980).

14. *Proposed Amendments to the Powerplant and Industrial Fuel Use Act; Hearings on H.R. 6625, 6654 and 7163 before the Sub. Comm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2nd Sess. 13 (1980).

15. 101 S. Ct. at 2965 (Blackmun, J., dissenting) (citing J. KRUTILLA, A. FISCHER

couraged, and in some cases even mandated, increased national reliance on coal as this nation's primary energy resource.[16] In addition, several other Congressional enactments[17] and statements given by several recent Presidents[18] demonstrate a growing national awareness of the dangers of increased reliance on foreign petroleum imports, and the benefits of the accelerated production of domestic coal.[19]

Were it not for the Mineral Lands Leasing Act of 1920,[20] Montana would not enjoy such a strategic advantage, nor would it have the right to tax the severance of much of its coal, for seventy-five percent of the coal reserves found in Montana are lo-

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& R. RICE, ECONOMIC AND FISCAL IMPACTS OF COAL DEVELOPMENTS NORTHERN GREAT PLAINS XVI (1978)).

16. The primary statute presented by the plaintiffs in this area was the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8301 (Supp. III 1979). This act "encourage(s) and foster(s) the greater use of coal . . . in lieu of natural gas and petroleum, as a primary energy source," and intends to "prohibit, or, as appropriate, minimize, the use of natural gas and petroleum as a primary energy source . . . ." Furthermore, section 8341(a)(1), states that "natural gas shall not be used as a primary energy source in an existing electric power plant on or after January 1, 1990"; and subsection (b) "prohibit(s) . . . the use of petroleum or natural gas . . . as a primary energy source in any existing electric power plant, if . . . such power plant has or previously had the technical capability to use coal or another alternative fuel as a primary energy source."

17. Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871, (codified at 42 U.S.C. § 6201 (1976 & Supp. III 1979)); Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (codified at 42 U.S.C. § 5801 (1976)); Energy Research & Development Administration Act of 1977, Pub. L. No. 95-39, 91 Stat. 180 (codified at 42 U.S.C. (Supp. III 1979)); Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246 (codified at 15 U.S.C. § 791 (1976 & Supp. III 1979)); Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083 (codified at 30 U.S.C. § 181 (1976 & Supp. III 1979)); Federal Non-Nuclear Energy Research and Development Act of 1974, Pub. L. No. 93-577, 88 Stat. 1878 (codified at 42 U.S.C. § 5901 (1976 & Supp. III 1979)); Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified at 15 U.S.C. § 3301 (Supp. III 1979)).

18. President Nixon gave the following message to Congress:

> Coal is our most abundant and least costly domestic source of energy. Nevertheless, at a time when energy shortages loom on the horizon, coal provides less than 20% of our energy demands and there is serious danger that its use will be reduced even further . . . .
>
> I urge that highest national priority be given to expanded development and utilization of our coal resources . . . . Each decision against coal increases petroleum or gas consumption, compromising our national self-sufficiency and raising the cost of meeting our energy needs.

President's Energy Message to Congress, 9 WEEKLY COMP. OF PRES. DOC. 389, 395 (April 18, 1973). *See also* President's Statement on Signing National Energy Bills, 14 WEEKLY COMPILATION OF PRES. DOC. 2138 (Nov. 9, 1978).

19. "Coal offers two critical advantages over oil and gas: freedom from both the instability of foreign markets and the whim of foreign suppliers, and vast reserves." *The Increasing Conflict*, *supra* note 2, at 675 n.1. It is estimated that the "total fossil mineral energy reserves in the United States are approximately 98% coal and 2% oil and gas." Whiteside and Gillig, *Coal and Conservation—Tax Policy*, 64 KY. L.J. 573, 574, (1975-76).

20. 30 U.S.C. § 181 (1976 & Supp. III 1979), *as amended by* Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083.

cated under land owned by the federal government.[21] Presently, such coal is mined under private leases from the federal government. These leases are obtained according to the Mineral Lands Leasing Act of 1920,[22] which permits Montana to exercise its right to levy and collect taxes upon the mining activity as if the federal government were not involved.[23]

As previously mentioned, Montana has levied a severance tax on the mining of coal since 1920. While this particular statute was not challenged until the present suit, other taxes in eastern coal mining states were challenged soon after the Mineral Lands Leasing Act was passed.[24] The Supreme Court resolved these

21. Brief for the Appellant at 16, 101 S. Ct. 2946.

22. 30 U.S.C. § 181 (1976 & Supp. III 1979).

23. Mineral Lands Leasing Act of 1920, 30 U.S.C. § 189 (1976 & Supp. III 1979) states that "Nothing in this chapter shall be construed or held to affect the rights of the states or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lease of the United States." This policy was thoroughly articulated in Mid-Northern Oil Co. v. Walker, 268 U.S. 45 (1925):

> The more natural view, and the one we adopt, is that Congress, having provided for leasing the public lands to private corporations and persons whose property, income, business and occupations ordinarily were subject to state taxation, meant by the provision to say in effect that, although the act [this chapter] deals with the letting of public lands and the relations of the government to the lessees thereof, nothing in it shall be so construed as to affect the rights of the states, in respect of such private persons and corporations, to levy and collect taxes as though the government were not concerned.

Id. at 48-49.

24. *See* Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922). This was an early challenge to a state tax upon the severance of coal. Although not a severance tax by name, the Pennsylvania law challenged by the Colliery Company provided that each ton of coal mined should be "subject to a tax of one and one half percentum of the value thereof when prepared for market." *Id.* at 253. At the heart of the appellant's challenge, which is also the essence of *Commonwealth Edison Co. v. State of Montana*, was whether a severance tax levied on a resource primarily destined for interstate commerce could be taxed by the state where it was mined, or whether such taxation constituted an impermissible burden upon interstate commerce. The Court developed a rigid mechanical test in determining the validity of the tax, focusing upon the inherently intrastate character of the mining of coal. From the often quoted opinion:

> [T]he contention is that the products of a State that have, or are destined to have, a market in other States, are subjects of interstate commerce, though they have not moved from the place of their production or preparation.
>
> The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a state determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth . . . and in the case of

challenges in favor of the states, upholding their sovereign power to tax the mining of coal within state boundaries. For some time following these early cases, severance taxes went unchallenged. Because there was nothing extreme or unusual about the initial Montana tax, it also was quietly paid for many years. It was considered by the mining and utility companies, who initially shouldered the tax, as simply a cost of doing business, which they in turn, passed on to ultimate consumers of the energy produced by the coal.[25]

However, in 1975, there was an enormous increase in the rate of coal severance taxation in Montana. Mining companies who had previously paid an average of $0.34 per ton severance tax now found themselves paying an average of $2.08 per ton, and in some cases the severance tax increased the cost to as much as $4.08 per ton of coal mined.[26]

As a result, in 1978, suit was filed in Montana district court,[27] challenging the tax as unconstitutional and violative of the Commerce and Supremacy Clauses of the United States Constitution. The district court dismissed the claim for failure to state a cause of action upon which relief could be granted,[28] and the Montana Supreme Court affirmed.[29] The case was appealed to the United

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> coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South . . . .

Id. at 259.

See also Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923); Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927). Both cases supported state severance taxes against constitutional challenges.

25. Prior to the 1975 act increasing the Montana severance tax, the typical severance fee paid was $0.34 per ton. Brief for Appellant, at 7-8, 101 S. Ct. 2946. Montana and Wyoming export the bulk of their coal. In 1978, 53 utilities in 21 states bought Montana and Wyoming coal, with 82% of the demand originating from out of state. In 1987, 92% of the demand will originate from other states. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, LIMITATION ON COAL SEVERANCE TAXATION, H.R. REP. NO. 1527, 96th Cong., 2nd Sess. 3 (1980) (hereinafter cited as LIMITATIONS ON COAL SEVERANCE TAXATION). These purchases are done almost solely according to long-term contracts (over twenty years or more) with specific mines and coal producers. Prior to 1975, when the increased severance tax was passed, twenty utilities had signed these long term contracts for a total of 800 million tons of coal. *Id.* at 4.

26. LIMITATIONS ON COAL SEVERANCE TAXATION, *supra* note 25, at 3. Commentators have suggested that the Arab oil embargo made Montana legislators aware of their potentially advantageous position on the domestic energy scene. *Id.* For a general discussion of the actions of the Montana Legislature, *see generally Limitations on Coal Severance Taxation, supra* note 25.

27. No. 42567 (Mont. 1st Judicial Dist., filed June 20, 1978).

28. MONT. REV. CODES ANN. § 25 ch. 20 (1979).

29. Commonwealth Edison Co. v. State of Montana, 615 P.2d 847 (Mont. 1980).

States Supreme Court, which affirmed the ruling.[30]

III. History of Commerce Clause Challenges to State Taxation

Even a brief glance at the history of the Supreme Court's decisions analyzing the validity of various types of state taxation reveals a confusing, tortured history of case law.[31] Here, the analysis was divided into two parts: a Commerce Clause challenge and a Supremacy Clause challenge. By far the most byzantine challenge has historically been that of the Commerce Clause, since the Supreme Court has struggled with various concepts and theories in developing a method to determine the constitutional validity of state taxes upon goods moving in interstate commerce.[32]

Before a decision was rendered in *Complete Auto Transit Inc. v. Brady*,[33] there were basically two competing concepts in determining when a state could validly impose a tax upon interstate trade.[34] One theory was based on the idea that interstate commerce should be immune from the burdens of state taxation in order to promote free trade between the states.[35] The second major

30. 101 S. Ct. at 2964.

31. The Supreme Court's decisions delineating the constitutional limitations on state tax power have often defied rational analysis . . . . Indeed, the Court came to recognize that consistency was not the hallmark of its pronouncements in this field (citing Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)), that form occasionally prevailed over substance (citing Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122-23 (1954)), and that to attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future (citing Freeman v. Hewit, 329 U.S. 249, 252 (1946)).

Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?* 75 MICH. L. REV. 1426, 1426 (1977) (hereinafter cited as Hellerstein).

32. "This case by case approach has left much room for controversy and confusion and little in the way of precise guides to the states in their indispensable power of taxation." Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959).

33. 430 U.S. 274 (1977).

34. 101 S. Ct. at 2964.

35. *See* Freeman v. Hewit, 329 U.S. 249 (1946).

The Commerce Clause . . . by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States . . . . A state is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States.

Id. at 252. *See also* Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925), wherein concept was that each state had a right to require that interstate businesses bear their proper share of the costs of supporting the local and state governments from which they were deriving benefits.[36] A shifting emphasis away from both of these two extremes, to the idea that in each case the practical effects of the scrutinized tax should be a determining factor in deciding its constitutionality, was noted in 1970 in the case of *Pike v. Bruce Church Inc.*[37]

Also to be considered in the Supreme Court's analysis of the scope of the Commerce Clause are those cases which do not deal with taxation at all, but rather, with the scope of federal authority under the Commerce Clause. These cases, articulating together the "substantial affect" doctrine, have played an important role in developing the Supreme Court's approach in determining the

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the Court noted that "The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected." *Id.* at 565.

36. The contrary view, holding that taxes may constitutionally be imposed upon the local incidents of interstate commerce, was established in the following line of cases: Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938), where the Court held that a tax of a local business which is separate is not forbidden under the Commerce Clause:

> It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of the tax burden even though it increases the cost of doing business . . . .
>
> All . . . taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it, but they are not for that reason prohibited.

Id. at 254-55. In addition, the case of Great A&P Tea Co. v. Cottrell, 424 U.S. 366 (1976), noted that the limitation upon the state power to tax provided by the Commerce Clause was by no means absolute. In the absence of conflicting legislation, the states retain authority through their police powers to regulate matters of "legitimate local concern," even though interstate commerce may be affected. *Id.* at 371. *See also* Simet & Lynn, *The Demise of Spector*, 31 NAT. TAX J. 53 (1978).

37. 397 U.S. 137 (1970). In this case, a state agricultural regulation affecting the packaging and transportation of agricutural products was struck down because its practical effect was found to be too burdensome to a cantaloupe grower whose packaging plant was 31 miles away, and just happened to be located in another state. The test, as articulated by the Court, is as follows:

> [T]he general rule statute that emerges can be phrased as follows: Where the regulates evenhandedly to effectuate a legitimate local public interest, *and* its effects on interstate commerce are only incidental, it will be upheld *unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits*. . . . The question becomes one of degree, and the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and *whether it could be promoted as well with a lesser impact on interstate activities.*

Id. at 142. (emphasis added). *See also* Nippert v. City of Richmond, 327 U.S. 416 (1946), where the Court noted that a state tax, having a substantial economic effect, actual or potential, upon interstate commerce, is *not* validated by the fact that it is laid upon a local incident which is separate and distinct from interstate transportation. *Id.* at 423. "It is an old doctrine, notwithstanding many early deviations, that the practical operation of the tax, actual or potential, rather than its descriptive label, or formal character, is determinative." *Id.* at 424 n.9.

proper balance between federal and state power.[38]

These divergent theories ultimately coalesced into a four-part test to determine the constitutional validity of a state tax on an interstate business in the case of *Complete Auto Transit Inc. v. Brady*.[39] In the *Complete*[40] case, the challenged tax was purportedly levied on the privilege of conducting a portion of an interstate business within the state of Mississippi. The Supreme Court did not uphold the tax as merely one in which the state was validly imposing a tax on a local incident of interstate commerce. Rather, the Court repudiated the established concept of "privi-

38. In essence, these cases support the plaintiffs' contention that the severance tax substantially affects interstate commerce, and therefore, Court scrutiny of its constitutional validity is required. In Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824), which held that the states do not have the authority to burden interstate commerce or to regulate those phases of the national commerce which, because of the need for national uniformity, demand that their regulation be prescribed by a single authority. In NLRB v. Jones-Laughlin Steel Corp., 301 U.S. 1 (1936), the "substantial affect" doctrine was articulated, defining those instances where Congress' right to control interstate commerce would supersede state regulation. "Although activities may be considered intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect the commerce from burdens or obstructions, Congress cannot be denied the power to exercise that control." *Id.* at 37. In Wickard v. Filburn, 317 U.S. 111 (1942), the right to regulate commerce was extended to those activities solely intrastate which affect interstate commerce, since the Court upheld the Congress' power to regulate the amount of wheat grown and sold solely within a state. Extending and further developing this doctrine were the companion cases of Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964), civil rights cases supporting the power of Congress to regulate motels and restaurants. The Court noted that "[t]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the state of origin and destination . . . which might have a substantial and harmful effect upon commerce. *Id.* at 258. *See also* United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942). While these cases more directly support the notion that Congress would have the authority to regulate a state's severance tax if it were found to substantially affect interstate commerce, they may also be viewed as determining precedentially what the Court has determined as being "in commerce".

39. 430 U.S. at 279. "The decision indicates that the [C]ommerce [C]lause . . . is to be viewed as restraining the exercise of state tax power without creating a broad zone of tax immunity for the constitutionally protected interest." Hellerstein, *supra* note 31, at 1442. It is ironic to note that in the instant case, as it was dismissed without trial, a broad immunity for severance taxation seemingly was created.

40. Briefly, a Mississippi tax on the privilege of doing business in the state was held by the Court not to violate the Commerce Clause when applied to an interstate activity. As the text notes, the Court repudiated the privilege concept entirely, and fashioned a four-step test to determine the constitutionality of state taxes on interstate commerce. 430 U.S. at 279.

lege" taxation entirely, and announced that the Commerce Clause is no bar to carrying on an interstate business in the taxing state.[41] In addition, the Court made "it clear that the [Commerce] [C]lause had not created an irreducible zone of tax immunity unrelated to its purposes."[42] A new constitutional test was developed to clarify the permissible range of state taxation of interstate commerce.

The four-part test for determining the constitutional validity of a state tax will be sustained under *Complete* if it is "applied to an activity which a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state."[43] Additionally, the Court noted: "[t]here is no economic consequence that follows necessarily from the use of the particular words 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect."[44]

IV. The Commerce Clause Challenge[45]

A. *The Montana Supreme Court's Analysis*

The first finding of the Montana Supreme Court in its Commerce Clause analysis was that the true taxpayers in the case were the Montana coal producers themselves, and not the utility companies who had joined in the action or the consumers who would eventually pay the severance tax in increased energy bills.[46] Therefore, the court felt it proper only to look to the status

41. *Id.* at 282.

42. Hellerstein, *supra* note 31, at 1445.

43. 430 U.S. at 279. In developing the test, the Court relied explicitly on the following cases as precedent: Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); General Motors Corp. v. Washington, 377 U.S. 436 (1964); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940). These terms will be analyzed in depth in the section relating to the holding of the United States Supreme Court.

44. 430 U.S. at 288. In a footnote supplementing this idea, the Court stated:

> It might be argued that "privilege" taxes . . . are easily tailored to single out interstate businesses and subject them to effects forbidden by the Commerce Clause . . . . Any tailored tax of this sort creates an increased danger of error in apportionment, of discrimination against interstate commerce, *and of a lack of relationship to the services provided by the State. A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce.*

Id. at 288-89 n.15 (emphasis added).

45. 615 P.2d 847, 850-58 (Mont. 1980). As did the United States Supreme Court, the Montana Supreme Court divided its analysis into two distinct sections, treating the Commerce Clause challenge first.

46. 615 P.2d at 850. The Montana court noted that it was the coal producers to whom the money would be returned if it were refunded.

of the coal producers at the time the resource was severed in determining the validity of the tax.[47]

The Montana Supreme Court adopted the rationale of the district court which had decided that the activity of mining coal was per se not within interstate commerce.[48] This led properly to the conclusion that the applicable test for determining the validity of the tax was the *Heisler v. Thomas Colliery Co.*[49] approach.[50] In addition, the Montana Court also applied the four-part test detailed in *Complete Auto Transit Inc. v. Brady*,[51] emphasizing particularly the fourth prong, the "fairly related" test.[52] The court deemed that the plaintiffs were misdirected in their belief that it was the duty of the court to factually scrutinize the rate of the tax and the amount of revenue it generated.[53] The court instead felt

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47. With a theme strongly protective of states' rights, the Montana Supreme Court bluntly held:

> We are not required here to determine whether the mined coal should not be considered a part of interstate commerce . . . . There is no need to concern ourselves with such fine points here. The severance itself is a taxable event and . . . is therefore ahead of . . . the power of Congress . . . such a decision would shatter the shield of judicially-approved states' rights . . . .

Id. at 857.

48. The district court determined that the cases relied on by the plaintiffs fell into four categories, which are set forth here with examples:

> 1). When Congress has asserted its regulatory power under congressional acts (NLRB v. Jones-Laughlin Steel Corp., 301 U.S. 1 (1937));
> 2). When the state engages in a regulatory activity of interstate commerce (Pike v. Bruce Church, Inc., 397 U.S. 137 (1970));
> 3). When the state imposes a tax upon interstate commerce activity (Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977)); and
> 4). When the state imposes a tax on an activity which is not in commerce (Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922)).

615 P.2d at 850.

49. 260 U.S. 245 (1922). For a brief overview of the case, *see* note 24 *supra* and accompanying text.

50. As the United States Supreme Court opinion expressly rejects the *Heisler* analysis in its opinion, any further discussion of it with respect to the Montana Supreme Court is omitted. 101 S. Ct. at 2952.

51. 615 P.2d at 855.

52. *Id.* The court noted with great emphasis that the coal producers had at their disposal all of the services and benefits that the Montana State government could offer, and in addition, the coal producers, through their strip mining activities, were themselves extracting a tremendous benefit from the state. *Id.*

53. *Id.* The Montana Supreme Court was apparently very concerned about the consequences of a ruling allowing judicial inquiry into the rates of severance taxes, as the following passage indicates:

> [F]or if the *rate of tax* on a local activity, as here, can be found to violate the commerce clause, then certainly the *amount of tax* raised by a state or local activity is in the same jeopardy. Were we or the United States

that because the tax was a general revenue tax, the proceeds of which were applied to the general support of the government, the "fair relation" aspect of the text was fulfilled.[54]

B. *The United States Supreme Court's Analysis*

Justice Marshall, writing the majority opinion for the Supreme Court,[55] agreed with the plaintiffs' contention that the *Heisler* "mechanical" approach[56] no longer accurately reflected the law concerning permissible state taxation of interstate commerce,[57] and declared that the severance tax would be properly evaluated under the tests set forward in *Complete Auto Transit Inc. v. Brady*.[58] In discarding the *Heisler*[59] approach, Marshall stated that "[i]n reviewing Commerce Clause challenges to state taxes, our goal has been to establish a 'consistent and rational method of inquiry into the practical effect of the challenged tax,'"[60] and

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> Supreme Court to reach that result, then we should see, in the words of the old spiritual, that "the walls came a-tumblin down".

Id. at 854.

54. *Id.* at 856. *See also* notes 59, 75, 125, 132, 140-44 *infra* and accompanying text.

55. Chief Justice Burger and Justices Brennan, Stewart, White, and Rehnquist joining the majority.

56. 260 U.S. 245 (1922).

57. 101 S. Ct. at 2952. The Court stated:

> *Heisler's* reasoning has been undermined by more recent cases. . . . [I]t evolved at a time when the Commerce Clause was thought to prohibit the States from imposing any direct taxes on interstate commerce . . . .
>
> The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a local or intrastate activity.

Id. See also Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 NAT. TAX J. 245, 249 (1978).

58. 430 U.S. at 279 (1977). As previously noted, the state tax challenged in *Complete* was that of a "privilege" tax, and was, as such, specifically tailored to fall upon interstate commerce. *Id.* at 288-89 n.15. Some commentators have suggested that the nature and effects of severance taxes are not at all analogous to the sort of tax analyzed in *Complete*, but are akin to exportation taxes:

> Like a toll gate lying athwart a trade route, a severance or processing tax conditions access to natural resources. Although in all likelihood severance taxes rarely reflect special expenses incurred by the state in protecting the act of extraction . . . they are tolerated because of the mechanical notion that the act of production is remote from interstate commerce . . . . There may also be a feeling that a state has an owner's interest in the deposits and is impoverished when they are taken out of the state . . . . The state's resources are diminished not by the severance of the mineral, for the extractive process adds to its value, but by exportation—and the commerce clause clearly prohibits the imposition of a tax on exportation.

Note, *Developments in the Law in State Taxation*, 75 HARV. L. REV. 953, 970-71 (1961-62).

59. 101 S. Ct. at 2952.

60. *Id.* (citing Mobil Oil Corp. v. Commissioner, 445 U.S. 425 (1980)). This case was an application of the four-part test in *Complete*; its application was toward the taxation scheme of income received from a foreign, interstate corporation, and was

noted that the same test should apply to Commerce Clause challenges of state severance taxation.[61] The Court felt that intra-interstate dichotomies present in *Heisler* were irrelevant for two reasons.[62] First, in Marshall's view, there was no real distinction in terms of economic effects between severance taxes and other sorts of taxes that had been subject to Commerce Clause scrutiny.[63] Secondly, the act of severance, like any other local incident of interstate commerce, should be made to pay its fair share in meeting the costs of supporting the local and state governments from which it derives benefits.[64]

In reviewing the plaintiffs' argument, the Court noted that the plaintiffs had not disputed the contention that the *Complete* test was the proper method for evaluating a state severance tax.[65] The Court recognized further that the plaintiffs were not disputing the contention that the first two parts of *Complete*, those

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held not to burden interstate commerce. As will be discussed more fully herein, the four-part test formulated is of little value in determining the validity of severance taxation when applied to a proportional tax such as Montana's, as the test will necessarily lead to the conclusion that the tax is constitutional. The reasoning is practically mechanical:

1). the activity, mining, certainly has a substantial nexus with the taxing state;
2). it is non-discriminatory as it applies to *all* producers of coal;
3). it is fairly apportioned, since the tax on severance can occur in no other state and therefore there is no danger of multiple taxation; and,
4). under the court's reasoning, if the tax is proportional to the contract value of the coal mined, it is fairly related to the services provided by the state, and no further scrutiny is warranted.

It is the author's suggestion that the *Complete* test is not readily applicable to incidents of severance taxation since it produces, necessarily, the outcome that the tax is constitutional if it is proportional. If the Court truly sought to examine the practical effect of the challenged tax, then scrutiny of the facts, especially in such a potentially explosive issue such as this, would have been warranted.

61. 101 S. Ct. at 2952-53. It is the author's contention that a consistent and rational method of inquiry into the practical effects of the tax would reveal the potential for destruction that the tax holds for fragile interstate relationships. This tax will hopelessly embroil states in conflicts over taxation of energy resources at a time when strong, unified interstate relationships are needed most. The broad support the Supreme Court gives to a state's sovereign power to tax flies in the face of the national cohesiveness required to triumph over the energy crisis.

62. 260 U.S. 245 (1922).

63. 101 S. Ct. at 2953, citing Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954). On its face, Marshall's contention is valid. However, economic effects should not be the sole concern of the Supreme Court. Examining the practical effects of the challenged tax on energy resources should necessarily encompass the broad ramifications this tax has for the nation as a whole.

64. *Id.* Again, this issue of a proportional tax supporting a state's general revenue fund will be more fully discussed below.

65. 101 S. Ct. at 2954.

which required a substantial nexus and fair apportionment, were satisfied.[66] The Court correctly concluded that the plaintiffs' Commerce Clause challenge dealt only with the third and fourth parts of the *Complete* test.[67] The plaintiffs argued that the third prong, which prohibited discrimination,[68] was violated since ninety percent of the coal mined in Montana was shipped out of the state under contracts that shifted the burden of tax to consumers who had no voice in the creation of the tax.[69] In addition, the plaintiffs also disputed the application of the fourth prong of the *Complete* test,[70] in that they contended that the severance tax was not fairly related to the services provided by the state.

In dismissing the first of the two contentions, Marshall deemed that an allegation of tax discrimination failed because the severance tax was levied equally upon all coal producers in the state, with no distinction as to whether the coal was intended for shipment out of state.[71] The Court found little merit in the plaintiff's contention that the severance tax was discriminatory under the Commerce Clause simply because the tax was shouldered primarily by out of state consumers, since a similar argument was "considered and rejected in Heisler."[72]

What seemed to be central to the plaintiffs' argument,[73] namely, the idea that Montana should not be allowed to exploit its monop-

66. *Id.* There can be no question that the act of mining coal very definitely fulfills the requirement of substantial nexus. In this particular case, there is no danger of unfair apportionment, as the taxing activity only occurs in Montana, and is not taxed in any other state.

67. 101 S. Ct. at 2954-55.

68. 430 U.S. at 288. *See* notes 43 *supra* and 71-76 *infra* and accompanying text.

69. 101 S. Ct. at 2953. Cases cited by the Court in which taxes were found to be discriminatory are an aid to understanding the Court's approach in *Commonwealth Edison*. The case of Maryland v. Louisiana, 101 S. Ct. 2114 (1981) dealt with a state tax on the "first use" of natural gas taken from the federally owned outer continental shelf in the Gulf of Mexico. The gas flowed through processing plants in Louisiana and through interstate pipelines to consumers in over 30 states. The Court deemed this to be a continual flow of natural gas interstate and held that as a result of tax exemptions given to instate natural gas suppliers, the first use tax was shouldered entirely by out of state consumers, and constituted an impermissible burden on interstate commerce, for the benefit and protection of instate producers and consumers. The instant case may be similarly analyzed, in an instance not addressed by the majority. Part of MONT. REV. CODES ANN. 15-35-103 (1979) *exempts* the first 20,000 tons of coal produced in the state from the tax; this has the practical effect of favoring the smaller, instate coal companies who do not pay tax on substantially on all of the coal they produce. *See* Boston Stock Exchange v. State Tax Comm. 429 U.S. 318 (1977) for a further application of the 'impermissible discrimination' standard.

70. 101 S. Ct. at 2955.

71. *Id.* It must be remembered, however, that smaller coal producers in Montana benefit from section three of the taxing statute, as this section of the statute exempts the first 20,000 tons of coal produced. *See* note 6 *supra*.

72. *Id.* at 2954.

73. Brief for Appellants at 5-6, 101 S. Ct. 2946.

olistic position with regard to its resources by passing the thirty percent severance charge onto customers who, in the near future, would be depending on Montana's large coal reserves for their energy needs,[74] was not regarded as an issue by the Court. In addressing this contention, Justice Marshall characterized the plaintiffs' exploitation theory as one that would "give the residents of one State the right to control . . . the terms of resource development and depletion in a sister State."[75] The Court relied on its finding that there was no distinction between the tax treatment of the intrastate and interstate producers of coal, and that, for this reason, Montana was hardly exploiting its advantageous position by exporting the tax burdens out of state. Instead, the Montana legislature merely levied a tax on anyone who mined coal in the state. The tax more than satisfied the third prong of the *Complete* test, in the Court's opinion.[76]

In the final segment of its analysis of the Commerce Clause challenge, the Court held that the plaintiffs' discrimination contention ultimately collapsed in light of their argument that the tax violated the fourth prong of *Complete*, under which the plaintiffs had claimed that the revenues generated by the thirty percent surcharge were not fairly related to the services provided by the state.[77] Marshall felt that when the plaintiffs conceded that the state had some power to tax the severance of minerals, the discrimination allegation was weakened substantially.

In arguing that the thirty percent tax was generating revenues not fairly related to the services provided by the state, the plaintiffs had contended that the *Complete* test merited a factual scrutiny of the practical effects of the challenged tax.[78] However, the Court held that this was an incorrect interpretation of the fourth prong of the *Complete* test, and, in addition, that alternative con-

74. *Id.*
75. 101 S. Ct. at 2955.
76. *Id.*
77. *Id.*
78. *See* note 59 *supra* and notes 124-31, 135 & 139-43 *infra* and accompanying text. An interesting argument raised by the plaintiffs was that scrutiny is especially mandated in the instant case where the legislative history of the Montana tax shows an utter absence of political controversy, discussion, or debate that is normally characteristic of legislative action. "The Legislature saw, and seized, an opportunity to enrich Montana's treasury without any burden to the state, without any effect on the state's residents, without any pain to the state's taxpayers." Brief of Amici Curiae at 8. *See* Hughes v. Oklahoma, 441 U.S. 322, 326 (1979); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935).

tentions, either that the tax was intended to reimburse Montana for costs of specific services provided by the coal mining industry, or that a state's power to tax an activity connected with interstate commerce cannot exceed the value of the services provided to the industry, were both invalid.[79] The Court's holding that such factual scrutiny was not mandated under *Complete* was based primarily on the characterization of the severance tax as a general revenue tax imposed for the general support of the government.[80] In so holding, the Court found no requirement that the tax be reasonably related to the value of the services provided by the state.[81]

Further, noting its recent holding in *Colonial Pipeline Co. v. Traigle*,[82] the Court felt that freeing interstate businesses from contributing to the general costs of providing for government service, apart from those directly attributable to the taxed activity, would place such businesses in a "privileged position,"[83] and that the Commerce Clause was not designed to prevent interstate activity from sharing in the burden of supporting state governments, even though doing so increases the costs of doing business.[84] The Court justified the tax as being fairly related to the

79. 101 S. Ct. at 2955-56.

80. *Id.* at 2956.

81. *Id.* The Court cited to Carmichael v. Southern Coal and Coke Co., 301 U.S. 495, 521-22 (1937), where the Court had noted that taxes are often imposed on a class of individuals which enjoys no direct benefit from expenditure of the tax. *See also* Thomas v. Gay, 169 U.S. 264, 280 (1898); St. Louis & S.W.R.R. Co. v. Nattin, 277 U.S. 157, 159 (1928). In *Commonwealth Edison*, the plaintiffs had questioned the characterization of the tax as a general revenue tax since in 1978 Montana citizens voted to place 50% of the revenues generated from the tax into a permanent trust fund, the principle of which cannot be disturbed except upon a three-quarters vote of both Houses of the Legislature. MONT. CONST. IX, cl. 5 As noted by the Court, "Nothing . . . prohibits . . . Montana from choosing to allocate a portion of current tax revenue for use by future generations." 101 S. Ct. at 2956 n.11.

One might argue that a glance at the legislative history of the Montana tax and the constitutional amendment suggest that the tax revenues are meant to rectify the problems created in Montana by the coal mining industry, and that the trust fund was set up to insure that once the resources are depleted from the state, Montana citizens will still retain some of the benefits of the mining activity. The characterization of the tax as a general revenue tax by the Montana Supreme Court, also subsequently adopted by the United States Supreme Court, appears to be at odds with the specific purposes of the tax as articulated by the Montana Legislature. Were the tax to be specifically tied to the coal mining industry, perhaps the Court would have then been urged to apply a cost-benefit balancing test in regard to the tax.

82. 421 U.S. 100, 108 (1975), which quoted Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

83. 101 S. Ct. at 2957.

84. *Id.* (citing Colonial Pipeline Co. v. Traigle, 421 U.S. 100, 108 (1975)). As enumerated in Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S., 207, 228 (1980), these burdens include sharing in the cost of providing police and fire protection, with the corresponding benefit of a trained work force and "the advantages of living in a civilized society" (quoting Japan Line, Ltd. v. County of Los

services provided by the state since the tax was taken as a percentage value of the coal mined rather than as a flat, across the board tax imposed without regard to the extent of the mining activities in the state.[85]

In addition, the Court declined to investigate the actual rate of the tax for other reasons. Establishing tax rates, the Court stated, was a legislative rather than a judicial matter.[86] Furthermore, the Court felt that fashioning a constitutional test for appropriate taxation rates would be nearly impossible, taking into account the myriad of social, demographic, economic, and political considerations undertaken by a legislature when imposing a tax.[87] Such a test, in the Court's view, would be too vague and broad to have any applicability to a particular challenge to a state taxation statute.[88]

In summary, the Court dismissed appellants' Commerce Clause challenge by relying on the *Complete* test. The Court found that the tax did not impermissibly discriminate against interstate commerce, since it was levied equally among all those mining coal in the state, noting that the fact that the tax happened to fall upon interstate consumers had no bearing on the validity of the tax itself. Also, the Court found that the tax, being proportional in nature to the amount of mining done in the state, was fairly related to the services provided by the state. The Court saw no need to establish a cost-benefit inquiry upon the consequences of the tax; the mere fact that the state had the right to levy a tax on interstate business for the support of the local government was a strong enough basis to uphold the tax under a Commerce Clause challenge.

Angeles, 441 U.S. 434, 445 (1979)). *See* Washington Dept. of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 750-51, 764 (1978); General Motors Corp. v. Washington, 377 U.S. 436, 440-41 (1969). The Court in *Commonwealth Edison* amplified upon this relationship in a later portion of the opinion, noting that these benefits are not "amorphous incantations designed to avoid a more searching inquiry. . . ." 101 S. Ct. at 2960.

85. 101 S. Ct. at 2958; *see* National Geographic Soc'y v. California Board of Equalization, 430 U.S. 551 (1977); Standard Pressed Steel Co. v. Washington Dept. of Revenue, 419 U.S. 560 (1975); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940).

86. 101 S. Ct. at 2959. *See also* Helson Randolph v. Kentucky, 279 U.S. 245, 252 (1929).

87. Economic, demographic, geographic, social and political consideration were among those mentioned by the Court. 101 S. Ct. at 2959.

88. *Id.*

C. *Historical Analysis of Supremacy Clause Challenges*

The basic theory underlying any challenge to a state statute brought under the Supremacy Clause[89] is that the state law is invalid due to the preemption of that particular field of legislation by the federal government.[90] As with the Commerce Clause, the history of the preemption-Supremacy Clause issues is both complex and confusing, since the theories offered by various Supreme Court decisions over the years have been affected, to a great extent, by the political makeup of the Court at that time.[91]

Despite the confusion, continual challenges to state legislation under the Supremacy Clause have yielded three definite avenues of analysis by which cases may be scrutinized. Consequently, three rather definite tests are applied to the various cases.[92] The first is the "direct conflict" theory.[93] Under this approach, the Court will analyze the state and federal statutes side by side, and determine if a true, actual conflict exists.[94] The second applicable preemption test involves an examination of the subject matter at issue, and a determination of whether there is a need for national

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89. U.S. CONST. art. XI, cl. 2.

90. One Author has suggested that "[t]he word [preemption] is used to describe the legal effect of the federal government's power to *exclude* a state *from* an area of legislation or the constitutional impotency of the states to *intrude into* an area of legislation." Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DEPAUL L. REV. 630 n.1 (1971-72) (hereinafter cited as Freeman).

Preemption takes place when state legislation prevents the "accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). This case, a hallmark in preemption analysis, dealt with the invalidation of a state statute which was essentially similar to the federal Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (repealed June 27, 1952, 8 U.S.C. §§ 1301-06 (1976)). In this case the federal statute was "so intimately blended and intertwined with the responsibilities of the national government [as to present] a complete scheme of regulation. . ." in the area, which precluded states from interfering with it. 312 U.S. at 66-67. The importance of *Hines* is that it declared the courts competent to find preemption even though express Congressional intent to occupy the field may have been lacking. Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975) (hereinafter cited as Note). Subsequent cases applying this standard included Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 157 (1942) and Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

91. "It is submitted that these [cases] are so hopelessly confused, and that the doctrine is used so often in place of mere logically available arguments, that they provide little guidance for our analysis." Freeman, *supra* note 90 at 631. *See also* Note, *supra* note 90, at 623-24. "The Supreme Court . . . has not developed a uniform approach to preemption; its decisions in this area take on an ad hoc, unprincipled quality, seemingly bereft of any consistent doctrinal basis." *Id.* at 624.

92. Freeman, *supra* note 90, at 636.

93. *Id.* at 636 n.33.

94. *Id.* The clearest example of a conflict would be federal law compelling an action that is forbidden under state law, or vice versa. This is generally the theory applied in the instant case. The inherent problem with this approach occurs when neither statute is explicit, and the underlying conflicts between the two laws become increasingly subtle.

uniformity of regulation regarding the subject.[95] The third major test articulated by the Court has been to determine if the federal legislation at issue manifests an indisputable purpose on the part of Congress to preempt the entire area of legislation regarding the particular issue.[96] Perhaps the most perplexing of these theories in practice is the direct conflict theory when no actual conflict involved, but it is hypothesized by a party that a conflict may potentially develop between the federal and state laws such that two incompatible standards of conduct will eventually be compelled. Such is the problem in the instant case.[97]

In *Commonwealth Edison*, the plaintiffs did not contend that federal legislation created an incompatible standard of conduct; rather, they maintained that the tax, especially its extreme rate, "substantially frustrated" the purposes of these congressional enactments.[98] Coupled with the basic complexity of "potential conflict" cases is the added confusion injected by the recent shift in

95. Freeman, *supra* note 90, at 636 n.33. The leading case articulating this theory is Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). In that case, a certain Pennsylvania law required that a sum of money be paid to a charity if a ship entering port did not have a pilot on board. The Congress had deferred the issue of license requirements for the pilots to the states, but had passed a law requiring that each vessel be equipped with a licensed pilot. The Court held that this state regulation did not conflict with any federal navigation law:

> [t]he nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable.

Id. at 319. For an application of this theory to the present case, *see* note 97 *infra*.

96. Freeman, *supra* note 89, at 636 n.33. The leading case in this field is Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 250 (1947), wherein the Court held that an Illinois state statute regulating the warehousing of agricultural products was void under the United States Warehouse Act, 39 Stat. 486, *as amended by* 7 U.S.C. § 241 (1976). The Court held that the strong wording of the federal statute evidenced Congressional intent to preclude state regulation by adopting the words "the power, jurisdiction, and authority" of the Secretary of Agriculture "exclusive with respect to all persons" licensed under the Act. 331 U.S. at 229.

97. Perhaps the plaintiffs' argument would have appeared stronger to the Court if the plaintiffs had argued for application of the relevant portions of all three of these tests, emphasizing such factors as: (1) the need for national uniformity of regulation over such a potentially destructive issue such as energy resources; (2) the Congressional intent of the PIFUA as it mandated the use of coal as a primary energy resource by 1990; (3) how excessive taxation rates frustrate the mining of coal to meet national energy needs; and (4) the conflict, albeit subtle, of the excessive taxation rates and the national energy policy toward the increased use of coal.

98. 101 S. Ct. at 2956.

the Court's emphasis upon federal-state relations.[99] The Court has demonstrated in several recent decisions that a state-directed view of preemption analysis is to be favored.[100]

With this background in mind, a consideration of the majority's holding in the present case becomes much clearer. Keeping in mind the consistent emphasis upon states' rights, the fundamental confusion when there exists no direct conflict between the federal and state legislation, and the deference historically accorded severance and general revenue taxation in the broad sense, the majority's holding was almost predictable.[101]

V. THE SUPREMACY CLAUSE CHALLENGE

A. *Mineral Lands Leasing Act of 1920*

The plaintiffs had contended that the Montana severance tax was invalid under the Supremacy Clause because it "substantially frustrated" the purposes of the Mineral Lands Leasing Act of 1920[102] by disrupting the federal statutory scheme which provided for the division of lease revenues between state and federal

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99. There is a "[c]oncern for state sovereignty which has led the Supreme Court to give an increasingly narrow reading to the preemption doctrine, and so give states more breathing room as long as they do not trample squarely on federal statutes . . . ." J. CHOPER, Y. KAMASAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 93 (1979).

100. Note, *supra* note 90, at 639, 642-45. These cases include: Goldstein v. California, 412 U.S. 546 (1973) ("marks the reemergence of a state presumption"); Kewanee Oil v. Bicron Corp., 416 U.S. 470 (1974) ("[t]he Court placed the protection of state interests above certainty in the accomplishment of federal interests"); New York State Dept. of Social Services v. Dublino, 413 U.S. 405 (1973) ("concerned itself less with protection of inviolability of federal scheme than with preventing the potential impairment of the state's ability to handle . . . mounting welfare costs"); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973) ("if Congress is authorized to act in a particular field, it should manifest its intention clearly").

101. The Montana Supreme Court deemed that the plaintiffs were not entitled to a trial on the Supremacy Clause challenge, as the court felt plaintiffs' allegation of "substantial frustration" of federal policy as defined by the broad dictates of the enumerated acts set forth by the plaintiffs, *see* note 17 *supra* and accompanying text, was "not a sufficient basis to trigger a factual determination" of the allegations set forth. 615 P.2d at 860. Noting that no state excise tax had ever been declared invalid unless it specifically conflicted with an Act of Congress, the court held that no excise tax should be struck as invalid because of its rate and the amount of revenue it generated, unless it was shown to be expressly prohibited by a federal act. *Id.* at 861. *See* Penn. Dairies, Inc. v. Milk Control Comm'n 318 U.S. 261 (1943), which held that "[an] unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred . . . ." *Id.* at 275. The court also cited Western v. City Council of Charleston, 127 U.S. 449 (2 Peters 449) (1829) for the declaration that a state's power to tax is a fundamental feature of its sovereignty that cannot be set aside on "weightless statements that a federal policy is being substantially frustrated." 615 P.2d at 861.

102. Ch. 85, 41 Stat. 437, 30 U.S.C. § 181 (1976), *as amended by* Federal Coal Leasing Amendments Act of 1975 Pub. L. 94-377, 90 Stat. 1083.

governments.[103] The foundation of the argument was that the severe rate of the tax would cause potential lessees not to bid on future federal lease arrangements, thereby reducing the total rents available to the federal government.[104] The Court dismissed this argument with two replies. The Court first noted that Congress in the Mineral Lands Leasing Act expressly authorized states power to impose severance taxes, in spite of the terms of the allocation formula,[105] without imposing any limit on the rate of such taxes. Therefore, the Court held, there was no preemption of the power of Montana to impose severance taxes, at least with respect to the 1920 Act.[106] The Court also responded to the preemption argument in a second fashion,[107] holding that the federal allocation scheme was meant only to secure "a fair return to the public" with regard to capturing the economic rents, and not to secure a certain amount of revenue under the allocation formula.[108]

103. The central idea in this analysis is the concept of "economic rents," which is the difference between the cost of production, including a reasonable profit, and the market price of the coal. 101 S. Ct. at 2952. These rents, under stipulations of the 1920 Act, are to be "captured" by the federal government in the form of royalty payments for the leases. The original 1920 Act provided that all receipts from the leases were to be divided between the states and the federal government as follows: 37.5% to a reclamation fund created by the Reclamation Act of 1902; and the remaining 10% to be deposited into the Treasury of the United States under miscellaneous receipts.

In 1975, the allocation formula was altered by § 9(a) of the Federal Coal Leasing Amendments Act of 1975, Pub. L. 94-377, 90 Stat. 1083 (codified at 30 U.S.C. § 181 (1976 & Supp. III 1979)) and the following formula was provided: the states now get 50% of the economic rents; the general reclamation fund to help pay for the environmental costs of mining gets 40% of the rents; and the Federal Treasury gets 10%.

104. 101 S. Ct. at 2961-62. The Court felt that the factual premise of this argument, that the principal effect of the tax is to shift a major portion of the "economic rents" from the Federal Treasury to the coffers of the state of Montana, is at odds with the Commerce Clause argument that the tax will *increase* the *price* of coal, thereby *increasing* the total economic rents available. This dichotomy is perhaps best explained by noting that the plaintiffs' Commerce Clause contention dealt with the present effects of the 30% tax while their Supremacy Clause challenge dealt with the effect of the tax on future leases entered into.

105. This argument reveals the "direct conflict" theory of the preemption doctrine in action. *See* note 93 *supra* and accompanying text.

106. 101 S. Ct. at 2961.

107. *See* note 103 *supra* and accompanying text.

108. 101 S. Ct. at 2961, quoting H.R. REP. NO. 681 94th Cong., 1st Sess. 7 (1975). Furthermore, the Court noted that to carry the argument to the logical extreme would mean that no severance tax was permissible, since *any* tax would diminish the economic return to the public. This would, in the court's opinion, conflict with

B. *Substantial Frustration of National Energy Policies*

The final argument addressed by the majority was that the Montana tax was invalid since it substantially frustrated national energy policies as articulated in several Congressional enactments and Presidential statements[109] which encouraged the use of low sulphur coal to meet the nation's growing energy needs. The plaintiffs had argued that they were entitled to a hearing on the merits of their claim, both to explore the contours of these policies and to determine the extent of actual conflict between the severance tax and the acts mentioned above.[110]

The Supreme Court recognized the plaintiffs' recitation of the numerous federal statutes encouraging the use of coal, particularly low sulphur coal,[111] but rejected the contention that these federal statutes preempted the state legislation at issue.[112] The

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the express wording of the 1920 Act permitting severance taxation. 101 S. Ct. at 2961.

109. *See* notes 17 & 18 *supra* and accompanying text.

110. Brief for the Appellant, 101 S. Ct. 2946.

111. 101 S. Ct. at 2962. In the opinion of the district court of Montana, an interesting contention was raised that later was not addressed in the Supreme Court's opinion. The district court noted that western coal, compared with midwestern and eastern coal, did have a much lower sulphur content, but that this fact, in itself, did not give support to the idea that national energy policies are totally dependent on the increased utilization of low sulphur coal. After noting several statutes proffered by the plaintiffs that purportedly encourage the use of low sulphur coal, the court then examined in detail the purposes and policies of the Clean Air Act Amendments of 1977 42 U.S.C. § 7401 (1976 & Supp. III 1979), and the Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6201 (1976 & Supp. III 1979) and their legislative histories, and determined that these acts actually *discouraged* production and utilization of low sulphur coal:

> The legislative history reflects to an extent Congressional dissatisfaction with the use of low sulphur Western coal to meet air emission standards. House and Conference Committees further reflect a Congressional intent to (1) reduce reliance upon Western coal and (2) promote expanded use of high sulphur Eastern and Midwestern coal. Low sulphur Western coal was relegated a more limited role, to be used principally by existing facilities for which technological upgrading or air pollution control equipment is unfeasible or impractical.

Commonwealth Edison Co. v. State of Montana, No. 42-657 (1st D. Mont. July 27, 1979). Specific provisions are found in 42 U.S.C. § 7411 and 7425. Interestingly, if both the Clean Air Act Amendments and the PIFUA had been given equal scrutiny by any of the courts, a conflict in these Federal statutes could have been found.

112. "We do not, however, accept appellants' implicit suggestion that these general statements demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal." 101 S. Ct. at 2962. *See also* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 111 (1978); Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977); Perez v. Campbell, 402 U.S. 637, 649 (1971); *see also* notes 89-101 *supra* and accompanying text. In Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), the Court upheld a California statute as valid under the Supremacy Clause on the grounds there was no actual conflict between the Federal Agricultural Marketing Agreement Act of 1937 and a state statute prohibiting the sale of avocados in California of less than eight per-

Court specifically noted the various clauses of the PIFUA, which prohibits new electric power plants or fuel burning installations from using natural gas or petroleum as a primary energy source after 1989.[113] The Court responded to this preemption challenge by reciting the statute, particularly the provisions for federal financial assistance to the states to meet the needs imposed by the coal mining.[114] According to the Court, the statute plainly contemplated the continuance of state severance taxation as a means for states to obtain necessary funds to meet the costs and adverse effects of coal mining.[115] Somewhat abruptly, the Court declared that since the PIFUA was the only federal statute which even arguably provided a specific basis for a preemption challenge under the Supremacy Clause, the other statutes did not merit consideration.[116]

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cent oil by weight. In addition, the Court noted that the subject matter of the regulation was within the traditional power of the state (preventing deceptions of consumers in retail food sales). *Id.* at 152. The *Florida Lime* case is analogous to the instant case as follows: the Court has held that there is no actual, direct conflict between the Montana severance tax and the Federal Statutes enumerated by appellants, and furthermore, that there is no evidence of Congressional intent to preempt the field of state taxation. Perhaps the Court's strongest argument is that historically, state taxation powers have been accorded tremendous deference. This argument is made even stronger in that the tax is not only meant to compensate for the environmental and economic costs of coal mining, but is also a general revenue tax, imposed for the support of the government. These reasons combined led the Court to the conclusion that the plaintiffs were not entitled to a hearing on this issue.

113. Powerplant Industrial Fuel Use Act of 1978, 42 U.S.C. §§ 8371-72, 8375 (1976 & Supp. III 1979). *See also* note 16 *supra*.

114. MONT. REV. CODE ANN. § 15-35-108 (Supp. 1975) lists the legislature's determination of costs and impact of coal mining, from which can be derived a "needs" analysis. This section, which deals with the statutory allocation of the proceeds of the tax, provides that 50% of the revenues are allocated to the permanent trust fund, and following this division, the remaining revenues are allocated, in varying percentages ranging from 2% to 26.5%, for projects such as alternative energy development funds, research and educational funds, direct allocation to the county where the coal is mined, and to coal highway improvement accounts. There is not a single provision, directly or indirectly, for a program specifically designed to deal with the environmental impacts associated with strip mining. Nor is there a program designed to deal with another major impact of strip mining on the local area, namely the creation of "boom towns" which spring up around the mines. For further analysis of these two major costs associated with strip mining, *see generally* H. LANDSBERG, ENERGY: THE NEXT TWENTY YEARS (1979).

115. 101 S. Ct. at 2963. 42 U.S.C. § 8401(a)(2) provides that "increased revenues, including severance tax revenues, royalties, and similar fees to the State and local governments which are associated with the increase in coal . . . development activities . . . shall be taken into account in determining if a State or local government lacks financial resources."

116. There is some question as to whether the Court delved deeply enough into

In short, the Court dismissed Supremacy Clause challenges with two basic replies: first, that the Montana tax was validly imposed according to the explicit wording of the 1920 Act and its 1975 amendments; and second, that the allegation that the tax frustrated national energy policies merited little consideration since there was no direct conflict with the statutes involved and that the power of a state to tax activities within its borders has long enjoyed great deference.

VI. The Dissenting Opinion

Justice Blackmun, writing the dissent in *Commonwealth Edison*,[117] argued that the plaintiffs were entitled to a decision on the merits of the case because there were substantial claims alleging that the severance taxes were not fairly related to the services provided by the state of Montana, and that as such, there was an intolerable burden placed upon interstate commerce.[118] Listing several reasons, Justice Blackmun deemed that a trial was imperative. Providing an extensive factual overview of the legislative history of the Montana tax,[119] he argued that since the tax was specifically tailored to fall on out of state consumers, it should not escape the scrutiny of the Court. In addition, he hinted as to what was possibly the most explosive issue of the case, primarily that as a result of the excessive rate of the Mon-

the commands of the PIFUA. As stated earlier, it is now federal law that natural gas and petroleum, with certain enumerated exceptions, *will not be used* as primary energy resources in electric generating plants after 1990. *See* note 113 *supra* and accompanying text. For additional information concerning the effect of the PIFUA, *see generally* Toll and Cottingham, *Powerplant and Industrial Fuel Use Act of 1978 and Possible Amendments Thereto*, 11 St. Mary's L.J. 653 (1980). *See also* Brownell, *Energy Independence—The Return to Coal, Constraints on Production and Utilization of Our Most Abundant National Energy Resource*, 11 St. Mary's L.J. 677, 695-97 (1980).

117. Joined by Justices Powell and Stevens.

118. 101 S. Ct. at 2964-65 (Blackmun, J., dissenting).

119. Noting the report of Joint Conference Committee of the Montana Legislature, Justice Blackmun pointed out that the legislators were well aware that the tax would be exported to out of state consumers, and that there was no doubt that the coal industry would continue to grow despite the tax. In other words, the out of state demand is relatively inelastic with regards to the consumption of coal as affected by the increasing tax, since "the combined coal reserves of Montana . . . are simply too great a part of the nation's fossil fuel resources to be ignored because of taxes at these levels." *Id.* at 2965-66 (quoting from the statement to accompany the Report of the Free Joint Conference Committee on Fuel Taxation, 1). This opportunistic attitude is reflected in statements made by the Governor of Montana before a Congressional Panel. There, the Governor conceded that Montana's needs are more than met by federal royalty payments and other tax revenues related to coal mining. *Surface Mining Control and Reclamation Act of 1977: Hearings Before The Subcomm. on Public Lands and Resources of the Sen. Comm. of Energy and Natural Resources*, 95th Cong., 2d Sess. 629-30 (1977) (statement of Montana Governor Thomas Judge).

tana tax, several other western states have considered raising, or have already raised, the rates of their severance taxes.[120]

A third point brought out by Justice Blackmun's dissent concerned the increasing percentage of the state's revenue generated by the Montana tax.[121] "In 1972, the then current flat rate severance tax on coal provided only 0.4% of Montana's total tax revenue. . . ."[122] This Justice Blackmun contrasted with the present twenty percent of the total state revenue now generated by the tax.[123]

Two additional factors supported the minority's argument that the effects of the tax should be scrutinized at trial. First, as a result of the tremendous revenues generated by the tax, the voters of Montana approved a constitutional amendment which provides that, beginning in 1980, fifty percent of the revenues generated by the tax will be channelled into a permanent trust fund, the principle of which can *never* be appropriated except with a three-fourths approval of both houses of the state legislature.[124] In addition, Justice Blackmun noted that in 1979, Montana granted cuts in both property and personal income taxes for the people of the state.[125] These factors, taken together, supported the minority's thesis that a trial was mandated to decide if the thirty percent severance tax constituted an impermissible burden upon interstate commerce since it was not fairly related to the services of

120. 101 S. Ct. at 2967 (Blackmun, J., dissenting). Indeed, this prospect is a problem potentially as divisive as the economic and social conditions that precipitated the Civil War. It does not require any large stretch of the imagination to picture California, with its vast resources, both renewable and nonrenewable, withholding the distribution of these resources in exchange for a secure, steady supply of water from surrounding states. In his dissent, Justice Blackmun noted one study which concluded that the western states appear to be emerging as virtual tax leaders and that cartels and arrangements between the energy rich states are being postulated as a form of alliance in the near future. *Id.* at 2965 n.5. Supporting this contention is a 1974 Montana subcommittee which has formed "to investigate the feasibility and value of multistate taxation of coal with the Dakotas and Wyoming and to cooperate with these other states to achieve that end." *Id.* (quoting H.R. 45, Subcommittee on Fossil Fuel Taxation, 1974 MONT. LAWS 1620).

121. 101 S. Ct. at 2966 (Blackmun, J., dissenting).

122. *Id.*, citing Griffin & Shelton, *Coal Severance Tax Policies in the Rocky Mountain States*, 7 POL. STUDIES J. 29, 33 (1978).

123. *Id.*

124. 101 S. Ct. at 2966. *See* MONT. CONST. art. IX, cl. 5.

125. 101 S. Ct. at 2967 (Blackmun, J., dissenting). These cuts were accomplished by 1979 MONT. LAWS CH. 698, amending §§ 15-30-112, 15-30-114, 15-300-122, and 15-30-142. M.C.A.

the state and discriminated against interstate commerce.[126]

Justice Blackmun attributed the majority's failure to recognize the need for a trial as resulting from its misunderstanding of the four-part test in *Complete Auto Transit v. Brady*.[127] The dissent criticized the majority's finding that the proper determination under the fourth part of *Complete*[128] was "simply whether the measure of the tax is fixed as a percentage of the value of the coal taken."[129] Justice Blackmun noted that this analysis would eliminate the viability of the *Complete* test in all cases where a proportional rather than a flat rate tax was challenged.[130] Such a test, Blackmun felt, would be as mechanical as the *Heisler* approach[131] expressly repudiated by the majority.[132] This approach would give the state unbridled discretion to impose severance taxes as long as they were "facially neutral and properly apportioned taxes."[133] In refuting the majority, the dissent emphasized the fourth part of *Complete*,[134] and contended that the tax was not fairly related to the services provided by the state because, in the present case, the plaintiffs were required to pay more than their just share of supporting the state government.[135] Justice Blackmun noted that the Supreme Court had never required that an interstate business be forced to pay more than its own just share of state tax burden and that dismissing the claims without a trial on this issue would set a dangerous precedent for the future.[136]

126. Included in Justice Blackmun's argument is the conclusion of the Hearings of the Interstate and Foreign Commerce Committee, which states that the severance tax generates revenues far in excess of the direct and indirect impact costs attributable to coal production. LIMITATIONS ON COAL SEVERANCE TAXATION, *supra* note 25, at 3.

127. 101 S. Ct. at 2968 (Blackmun, J., dissenting).

128. *See* note 43 *supra* and accompanying text.

129. 101 S. Ct. at 2968 (Blackmun, J., dissenting).

130. *Id.*

131. *Id.*

132. *See* notes 55-64 *supra* and accompanying text.

133. 101 S. Ct. at 2970 (Blackmun, J., dissenting).

134. *See* note 43 *supra* and accompanying text.

135. 101 S. Ct. at 2968 (Blackmun, J., dissenting). "The gravemen of appellants' complaint is that the severance tax does not satisfy the fourth prong of the *Complete* test because it is tailored to, and does, force interstate commerce to pay *more* than its way. Under our established precedents, appellants are entitled to a trial on this claim." *Id.*

136. *Id.* "To be sure, the task is likely to prove to be a formidable one; but its difficulty does not excuse our failure to undertake it." *Id.* "There is no basis for the conclusion that the issues presented would be more difficult than those routinely dealt with in complex civil litigation." *Id.* at 2971 n.17. In so stating, Justice Blackmun cited Michigan-Wisconsin Pipe Line v. Calvert, 347 U.S. 157 (1954). The *Calvert* Court held that the ruling of the Texas Supreme Court, that no trial was necessary to consider the merits of the effects of a facially neutral tax because "[the state] has afforded great benefits and protection to [the business]", 347 U.S. at 163, was in error, and that the proper analysis of the validity of a tax depends "on other considerations of constitutional policy having reference to the substan-

In addition, Justice Blackmun felt that judicial scrutiny was especially necessary where the tax imposed is not likely to be alleviated by those political restraints which are normally exerted on legislation when it adversely affects interests within a state,[137] especially in a situation, as in the instant case, where the taxing state has almost a virtual monopoly of the resources being taxed, and the consumption and demand are fixed, and primarily generated from outside of the state.[138] Nor did the dissent feel that the Court should be intimidated at the prospect of factually analyzing the validity of the tax, despite the complex economic considerations involved.[139] Justice Blackmun felt that a rough estimate of whether the tax was grossly disproportionate as borne by the out of state consumers was required as a preliminary step to determine if the tax was a legitimate revenue measure.[140]

VII. CRITICISM OF THE SUPREME COURT'S OPINION

A. *Commerce Clause Challenge*

There are two major difficulties with the Supreme Court's analysis of the severance tax issue. First, the *Complete Auto Transit* "fair relation" test[141] is simply not applicable to the proportional

tial effects, actual or potential, of the particular tax in suppressing or burdening unduly the Commerce." 347 U.S. at 164 (quoting Nippert v. City of Richmond, 327 U.S. 416, 424 (1946)).

137. 101 S. Ct. at 2970 (Blackmun, J., dissenting) (citing McGoldrich v. Berwind-White Co., 309 U.S. 33, 46 n.2 (1940)). To be sure, severance taxes have historically been accorded great deference, beginning in 1922 with the *Heisler* decision. Yet, this should not cause the Court to refrain from scrutinizing the tax, especially in a case such as this, where the burdens of the tax are borne primarily by out of state consumers who have no voice in the imposition of the tax. In determining if a tax does discriminate against interstate commerce, "it is relevant to inquire whether a tax is subject to a local political check . . . ." Hellerstein, *Developments in the Law: Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 957 (1962).

138. 101 S. Ct. at 2971, citing Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 232 (1957). *See also* Hellerstein, *Constitutional Restraints on State and Local Taxation of Energy Resources*, 31 NAT. TAX J. 245, 249-50 (1978); R. POSNER, ECONOMIC ANALYSIS OF LAW, 510, 514 (2nd Ed. 1977).

139. *See* note 83 *supra* and accompanying text.

140. Simply a general estimation of whether the tax is a legitimate revenue measure, roughly comparable to the taxes imposed on other industries, is the test Blackmun would initially apply to a challenged tax. If the Court were then to find that the tax is disproportionate to the costs generated by the activity, the Court would then have to determine if there were a reasonable basis for the disparity. 101 S. Ct. at 2971.

141. *See* notes 77-85 & 127-31 *supra* and accompanying text.

"general revenue" tax, since the application of the test will always result in finding the tax permissible. Second, the decision gives states unbridled discretion to develop revenue-maximizing taxation schemes. This will result in the destruction of delicate interstate relationships that are crucial to a successful response to the present national energy crisis.

What the Supreme Court has failed to realize in *Commonwealth Edison* is that the taxation of energy resources in an era of increasing scarcity and rapidly mounting costs simply cannot be analyzed according to the previously developed tests. To be certain, the *Complete Auto Transit* test is a laudable attempt by the Court to untangle the complex web of interstate commerce taxation. The development of a concise, four-part standard has simplified taxation adjudication in many cases. However, energy resource taxation is not an area amenable to the *Complete* four-part test. Applying this Court's rationale, a proportional tax, no matter what its rate, will *always* be acceptable under *Complete*, as long as the tax is in some way related to the state's general revenue fund.[142]

The Supreme Court did not penetrate far enough into the issue when it applied the *Complete* test. Facially, the Court's determination satisfies the four parts of *Complete*, but it does not sufficiently examine the complexities of the controversies involved.[143] The decision merely serves to exacerbate the energy problems already at hand. The Court abdicated its responsibility to give the Montana tax factual scrutiny, and indeed, did not even follow its own warning in *Complete* concerning overzealous application of the "fair relation" standard.[144] The elimination of this necessary scrutiny has forced other states and the mining industry to shoulder an unconstitutionally heavy burden of supporting Montana's

142. *See* note 59 *supra* and accompanying text.

143. *See* note 5 *supra*. A simple application of the fair relation standard, that is legitimately applicable to ordinary circumstances of interstate business, is simply not appropriate when analyzing resource taxation. This is because the increased cost of energy supplied by this coal as a result of the tax affects all consumers in every aspect of their lives. A tax of this sort inherently has a broader effect on interstate commerce than does a tax on one single interstate business. Thus, a superficial scrutiny of the "fair relation" and "discrimination" standards as given by the majority does not answer the plaintiffs' challenges. The Court needs to go further to adequately respond to the claim.

144. The Court in *Complete* did stipulate that its ruling was not meant to be taken as granting the states the unlimited right to tax interstate commerce.

> Any tailored tax of this sort creates an increased danger of error in apportionment, of a discrimination against interstate commerce, and of a lack of relationship to the services provided by the State. . . . A tailored tax, however accomplished, must receive the careful scrutiny of the Courts to determine whether it produces a forbidden effect on interstate commerce.

430 U.S. at 288-89 n.15.

costs of general government services. Sadly, the Court shows no concern over the ramifications of its decision.

There is a second major difficulty in the Supreme Court's reasoning in the severance tax case. The decision leaves open, without any guidelines or cautioning words, the entire issue of energy resource taxation. It is as if the case was decided in a vacuum. After analyzing the opinion, one cannot help but question whether the Justices were aware of the 1973 oil embargo, the national dependence on precarious foreign oil supplies, the increasing prices in power generation, or the demonstrated benefits that coal utilization can lend in solving the energy crisis.[145] Admittedly, it is not the Court's job to establish the rate of the tax; that is certainly the job for a legislature. But if the Court wished to be truly responsive to the issue, it could have offered some creative guidelines for states to follow instead of adhering blindly to *Complete*.[146] Indeed, research reveals that other western coal states are considering, or have already raised their resource taxes.[147] Had the Court factually scrutinized the Montana tax, it would have realized this danger.

As mentioned above, the Court felt that establishing the proper rate of taxation was an issue properly left to state legislative bodies. Yet, in a brief footnote, the majority noted that the controversy has spawned the introduction of several bills in Congress to limit the permissible rate of severance taxation nationally at twelve and a half percent.[148] Failure of the Court to comment on national legislation of coal severance taxation seems contrary to the free reign given to the states in establishing their own taxes. The Court's handling of the area of legislative responsibility raises more questions than it answers. It is neither clear whether the Court believes that Congress should move to enact national limits to severance taxes, nor whether it would find such limits constitutional.[149] Indeed, if the Supreme Court wished to en-

145. Western coal offers two critical advantages over eastern coal: it is less expensive, $6 to $9 cheaper per ton, than eastern coal, and it is less polluting than eastern coal because of its low sulphur content. In addition, future demand for coal is expected as the development of coal gasification increases. Binder, *Strip Mining, the West, and the Nation*, 12 LAND AND WATER L. REV. 2, 4 (1977).

146. *See Limitation on Coal Severance Taxation*, *supra* note 25.

147. 101 S. Ct. at 2967 (Blackmun, J., dissenting).

148. Bills introduced: S. 2695, 96th Cong., 2d Sess. (1979); H.R. Res. 6654, 7163, 6625, 96th Cong., 2d Sess. (1979); S. 178, 97th Cong., 2d Sess. (1980).

149. It is apparent that the Court proceeded on the questionable assumption

courage national legislation, why did it leave the matter before the states to do as they saw fit?

B. Supremacy Clause Challenge

The expansive view given to Montana's power to tax coal mining, accomplished by a very narrow interpretation of the preemption cases, spells defeat for the United States in its quest for energy independence. The energy shortage is a very critical national concern of the twentieth century; yet the Supreme Court insists that Montana's sovereign right to tax coal mining remains unaffected by the energy crisis.

To be certain, a state's power to tax is not to be lightly interfered with. The author suggests, however, that national energy problems demand new insights in the application of established preemption tests. Such strict adherence to states' rights theories, especially with respect to taxation of nonrenewable energy resources, has no place in an era of energy uncertainty. There should be no requirement of direct or actual conflict between a federal statute mandating the increased utilization of coal and a state statute imposing excessive burdens on the price and availability of that coal. Common sense tells every citizen that outrageous tax rates frustrate any attempt to solve the energy crisis.

The Court should have directly acknowledged the strong possibility that the Montana legislators were acting as revenue maximizers when they were structuring the tax. The Court's decision ignores any idea that perhaps the legislation was entirely political, and that the legislators ignored the needs of the nation in raising their tax. Rather, one concludes that the Court believed that the Montana legislators were acting as benefactors, demonstrating a rational, well balanced concern for the ramifications of the tax upon all consumers affected. Such is simply not reality.[150]

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that an issue as politically divisive as resource taxation could be fairly and effectively dealt with by Congress.

150. *See* notes 4 & 74 *supra* and accompanying text. The plaintiffs have characterized the 30% tax as "exacting a tribute from the inhabitants of [Montana's] energy poor sister states." Brief for the Appellant at 2, 101 S. Ct. 2946. Recent facts reveal the increase in Montana's wealth:

> In 1979, shipments to out of state consumers aggregated 28 million tons of coal, accounting for at least 90% of the value of Montana's production. Plaintiffs paid severance taxes of about 60 million dollars on these shipments. Under terms of existing contracts, they estimate the amount payable over the next two decades will reach several billion dollars.

Id. A more immediate effect of the tax may be measured in terms of new contracts entered into after the tax was imposed. Prior to 1975, various utilities had signed long term contracts for approximately 800 million tons of coal. Eleven of these contracts were for 20 years or more. After the 1975 tax increase the percentage increase of new contracts decreased dramatically:

VIII. CONCLUSION

The largest flaw in the United States Supreme Court's analysis of the constitutionality of the severance tax concerns the application of the fair relation standard in *Complete Auto Transit v. Brady*.[151] It is this application the author would adjust in determining the validity of the tax.

As suggested by Justice Blackmun in his dissent, the Court did indeed have the ability to factually scrutinize the tax to determine if there was a fair relation between it and the services provided by the state. Rather than abdicate its responsibility, the Court should have instead applied the holdings and rationale found in *Nippert v. City of Richmond*[152] and *Pike v. Bruce Church, Inc.*,[153] in making this determination. Taken together, *Nippert* and *Pike* hold that the constitutional validity of a tax depends on its substantial effects, actual or potential, upon commerce, and that when the burden imposed upon commerce exceeds its putative local benefits, the permissible degree of the tax depends on the interest being taxed and whether the state's interest in taxation can be promoted in an alternative manner with a lesser impact upon commerce. Applied to the instant case, an examination of the actual and potential effects of the extreme severance tax[154] indicates that they outweigh the interest of Montana in imposing it. The interest of Montana could fairly be promoted with a lesser impact on commerce merely by lowering the rate of the tax to one

MONTANA COAL PRODUCTION 1970-1979

Before 30% tax	tons mined (×1000)	percentage change
1970	1,280	—
1971	7,299	—
1972	7,931	8.7
1973	10,541	32.9
1974	13,675	29.7
1975	22,087	61.5
1976	26,181	18.5
1977	27,000	4.6
1978	26,679	2.6
1979 July	17,083	—

The growth rate on the chart demonstrates a definite decrease in the amount of coal produced after the tax was imposed. Brief for Appellant, p.4.

151. 430 U.S. 274 (1977).
152. 327 U.S. 416 (1946).
153. 397 U.S. 137 (1970).
154. *See* note 37 *supra*.

which fairly imposes the burdens of supporting the state government.

The issue of energy resource taxation is very complex. Simple solutions are not available. Yet, the Supreme Court has responded to the first substantial coal controversy of the current energy crisis by placing a band-aid on a growing cancer. At best, such actions are founded upon illusions about the politics of taxation. At worst, the Court's decision, demonstrating a lack of understanding or responsiveness to the entire issue, welcomes us to a national nightmare.[155]

In holding that the Montana severance tax does not merit factual scrutiny, the Court fell back on ideological theories rather than practical considerations. Edward Miller described the problem that arises when one is confronted with a dilemma that is not well understood when he stated that "[i]f a public issue is not well understood, perhaps because of its inherent complexity, ideology will tend to dominate public choice. If the prevailing ideology happens to correlate well within the pragmatic answer, the nation is fortunate; if not, the nation is poorly served."[156]

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155. The immediacy of the effects is brought out in the following passage:

> Unless the Court acts to safeguard the national economy against the individual state's exploitation of a fortuity—the location of a natural resource—the prospect looms of a wealthgap dividing the nation into warning camps. A few states, rich in mineral deposits, foresee overflowing coffers, vast improvements in public services, substantial elimination of local and state burdens, and the benefits of widespread economic prosperity, all by reason of state exploitation of energy resources through the device of exported taxes. The rest of the nation, dependent for its survival on these costly sources of energy, faces deficits, deterioration, and decline.

Brief of Amici Curiae at 3, 101 S. Ct. 2946.

156. E. MILLER, *Energy Politics: The Irrelevant Debate* 275 (H. Browne, ed., 1977).